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James C. Clark

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EXAMINER

GWARTNEY, ELIZABETH A

ART UNIT

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DELIVERY MODE

02/07/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/792,117

Applicant(s)

CLARK ET AL.

Examiner

ELIZABETH GWARTNEY

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-40 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-40 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SF/DE)
Paper No(s)/Mail Date 20051219;20061213;20070815.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date ____.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: ____.

DETAILED ACTION

Information Disclosure Statement

1. All references cited on IDS filed on 12/19/2005 pages 1-2 have been already submitted and considered as part of IDS filed on 12/19/2005 pages 3-5.

US patent document 2004/0191402 A1 cited on IDS filed on 12/13/2007 has been already submitted and considered as part of IDS filed on 12/19/2005.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
4. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was

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not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

5. Claims 1-12, 14-16, 18-25, 32, and 34-40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cherukuri et al. (US 4,317,838) and in view of Kramer et al. (US 2,886,440).

Regarding claim 1, Cherukuri et al. discloses:

A coated confectionery product (Abstract) comprising:

(a) a confectionery center C2/L14-17, Examples 1-3) ; and

(b) a powder coating layer on the center (see dusting mix – C2/L25-26) the powder coating layer comprising

(i) a flavor (C4/L46-47), and

(ii) the outermost layer of the product (C2/L24-26, C4/L40-44).

While Cherukuri et al. discloses a powder coating layer comprising flavor (C4/L41-42), the reference does not explicitly disclose that the flavor is encapsulated in a water-soluble encapsulant.

Kramer et al. teaches a chewing gum composition with a flavorant encapsulated in a water soluble encapsulant (C1/L15-18, 61-68, C2/L1-29, C5/L20-29). Kramer et al. also teaches gum containing the encapsulated flavor is characterized by an instantaneous and high degree of flavor release (C3/L20-22, 37-38). Further, Kramer et al. teaches that the use of encapsulated flavors in chewing gum products permits attainment of high flavor levels with the use of lower amounts of flavorings (C3/L 45-48).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have added an encapsulated flavor into the chewing gum powder coating of Cherukuri et al., as taught by Kramer et al., for the purpose increasing the initial rate and intensity of flavor release, thereby allowing the use of substantially less flavoring in the chewing gum composition.

Regarding claim 9, modified Cherukuri et al. discloses all of the claim limitations as set forth above. Kramer et al. also teaches that the encapsulated flavor is spray dried (C2/L11-13).

Regarding claims 2 and 8, modified Cherukuri et al. discloses all of the claim limitations as set forth above. Cherukuri et al. also discloses a coated confectionary comprising a binder layer between the center and the powder coating layer (C2/L18-26, C3/L24-29). Further, Cherukuri et al. discloses, that the binder layer comprises a solution of bulk sweetener (Abstract, C2/L60-C3/L4) and a binder selected from the group consisting of gum arabic and modified starches (Abstract, C3/L24-29).

Regarding claims 3 and 14, modified Cherukuri et al. discloses all of the claim limitations as set forth above and also discloses that the confectionery center comprises a chewing gum product and further comprising a hard shell coating between the chewing gum product center and the powder coating layer (Abstract, Examples 1-3). Further, Cherukuri, et al. discloses that the hard shell coating is made from a polyol selected from the group consisting of sorbitol, xylitol and mixtures thereof (C2/L60-64).

Regarding claims 4 and 15, modified Cherukuri et al. discloses all of the claim limitations as set forth above and that the powder coating layer further comprises a bulk

sweetener (C3/L51-54, C2/L60-C3/L4) where the bulk sweetener comprises a polyol (C2/L60-64).

Regarding claim 18, while Cherukuri et al. discloses a powder coating comprising a bulk sweetener, the reference does not explicitly disclose that the powder coating layer comprises about 60% to about 80% bulk sweetener. Since the instant specification is silent to unexpected results, the specific amount of dry bulk sweetener is not considered to confer patentability to the claims. As sweetness intensity is a variable that can be modified, among others, by adjusting the amount of bulk sweetener in the powder layer, with said sweetness intensity increasing as the amount of bulk sweetener is increased, the precise amount of bulk sweetener would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount of bulk sweetener cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of bulk sweetener in the powder coating layer of modified Cherukuri et al. to obtain the desired sweetness (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223).

Regarding claim 5, modified Cherukuri et al. discloses all of the claim limitations as set forth above. Cherukuri et al. further discloses that the confectionery center comprises a compressed tablet (C1/L9-14, C5/L56-60, C7/L55-58).

Regarding claim 6, modified Cherukuri et al. discloses all of the claim limitations as set forth above. While Cherukuri et al. discloses flavoring can be added to the compressed tablet center, the reference does not explicitly disclose said flavor including mint flavor (Example 4-5, Table III). However, Cherukuri et al. does disclose that mint flavor may be added to the gum base of a chewing gum center (C4/L50-51, 67). Therefore, the use of said flavor including mint flavor in the compressed tablet centers of modified Cherukuri et al. would be obvious to one of ordinary skill in the art, because it would amount to nothing more than a use of a known flavor for its intended use in a known environment to accomplish entirely expected results.

Regarding claims 7 and 19, modified Cherukuri et al. discloses all of the claim limitations as set forth above but does not explicitly disclose that the powder layer contains at least about 10% of the encapsulated flavor or about 15% to about 40% spray dried flavor (i.e. encapsulated flavor) respectively. Since the instant specification is silent to unexpected results, the specific amount of encapsulated flavor is not considered to confer patentability to the claims. As intensity of flavor is a variable that can be modified, among others, by adjusting the amount of encapsulated flavor in the powder layer, with said intensity of flavor increasing as the amount of encapsulated flavor is increased, the precise amount of encapsulated flavor would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount of encapsulated flavor cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by

routine experimentation, the amount of encapsulated flavor in the powder coating layer of modified Cherukuri et al. to obtain the desired flavor intensity (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223).

Regarding claim 32, Cherukuri et al. discloses:

A method of producing a powder coated confectionery product comprising the steps of:

- a.) providing a center (C2/L16-17);
 - b.) forming a binder layer over the center by applying a liquid syrup (C2/L18-22);
- and
- c.) applying a powder coating over the binder layer (C2/L25-26), the powder coating comprising a flavor (C4/L46-47).

While Cherukuri et al. discloses applying a powder coating layer comprising a flavor, the reference does not explicitly disclose that the flavor is encapsulated in a water-soluble encapsulant. Kramer et al. teaches a chewing gum composition with a flavorant encapsulated in a water soluble encapsulant (C1/L15-18, 61-68, C2/L1-29, C5/L20-29). Kramer et al. also teaches gum containing the encapsulated flavor is characterized by an instantaneous and high degree of flavor release (C3/L20-22, 37-38). Further, Kramer et al. teaches that the use of encapsulated flavors in chewing gum products permits attainment of high flavor levels with the use of lower amounts of flavorings (C3/L 45-48).

The motivation for adding flavor encapsulated with a water-soluble encapsulant to the powder coating layer of Cherukuri et al., as taught by Kramer et al., is set forth above.

Regarding claims 10 and 38, modified Cherukuri et al. discloses all of the claim limitations as set forth above but does not explicitly disclose that the powder layer contains about 50% to about 90% dry bulk sweetener and about 10% to about 49% spray dried flavor (i.e. encapsulated flavor). Since the instant specification is silent to unexpected results, the specific amount of dry bulk sweetener and encapsulated flavor is not considered to confer patentability to the claims. As flavor intensity and sweetness are variables that can be modified, among others, by adjusting the amount of bulk sweetener and encapsulated flavor in the powder layer, with said flavor intensity and sweetness increasing as the amount of bulk sweetener and encapsulated flavor are increased, the precise amount of bulk sweetener and encapsulated flavor would have been considered result effective variables by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount of bulk sweetener and encapsulated flavor cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of bulk sweetener and encapsulated flavor in the powder coating layer of modified Cherukuri et al. to obtain the desired flavor intensity and sweetness (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are

disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223).

Regarding claims 11-12, 20 and 39-40, modified Cherukuri et al. discloses all of the claim limitations as set forth above. While Cherukuri et al. discloses that the powder coating layer and binder layer comprise high-intensity sweetener where the high-intensity sweetener is aspartame (C3/L18-23, C4/5-7), the reference does not explicitly disclose that the powder coating layer comprises about 0.1% to about 5%, about 0.5% to about 3%, or about 1% to about 5% high-intensity sweetener respectively. Further, Cherukuri does not disclose that the binder layer comprises about 0.1% to about 5% high-intensity sweetener. Since the instant specification is silent to unexpected results, the specific amount of high-intensity sweetener in the powder coating layer is not considered to confer patentability to the claims. As product sweetness is a variable that can be modified, among others, by adjusting the amount of high-intensity sweetener in the powder layer, with said intensity of flavor increasing as the amount of encapsulated flavor is increased, the precise amount of high-intensity sweetener would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount of high-intensity sweetener cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of high-intensity sweetener in the powder coating layer of modified Cherukuri et al. to obtain the desired product sweetness (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the

general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223).

Regarding claim 16, modified Cherukuri et al. discloses all of the claim limitations as set forth above. Cherukuri et al. also discloses that the coated confectionery product is sugarless (Abstract, C5/L9-19, Examples 1-3, C7/L20-24).

Regarding claims 21-24, modified Cherukuri et al. discloses all of the claim limitations as set forth above but does not explicitly disclose that the powder coating layer comprises about 0.5% to about 2% by weight of the product, the binder layer comprises between about 0.2% and about 1% by weight of the product, the hard shell layer comprise about 10% to about 50% by weight of the product, and that the binder layer and powder layer together comprise about 2% of the product. Since the instant specification is silent to unexpected results, the specific weight of the powder, binder, and hard shell layers are not considered to confer patentability to the claims. As the thickness of the confectionery coating is a variable that can be modified by adjusting the weight of the powder, binder, and hard shell layers, with said thickness increasing as the weight is increased, the precise weight of said powder layer, binder layer, and hard shell layer would have been considered result effective variables by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed weight of the powder, binder, and hard shell layers cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the weight of the powder, binder, and hard shell layers in the confectionery product of modified Cherukuri

et al. to obtain the desired coating thickness (*In re Boesch*, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (*In re Aller*, 105 USPQ 223).

Regarding claim 25, while modified Cherukuri et al. discloses all of the claim limitations as set forth above, the reference does not disclose that the center is between 0.2 and about 2.0 grams in size. Since the instant specification is silent to unexpected results, the specific size of the confectionery center is not considered to confer patentability to the claims. As the serving size is a variable that can be modified by adjusting the size of the confectionery center, with said serving size increasing as the size of the confectionery center is increased, the precise size of the confectionery center would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed size of the confectionery center cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the size of the confectionery center in the confectionery product of modified Cherukuri et al. to obtain the desired serving size (*In re Boesch*, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (*In re Aller*, 105 USPQ 223).

Regarding claims 34-36, modified Cherukuri et al. discloses all of the claim limitations as set forth above. Cherukuri et al. also discloses that no liquid is applied after the powder coating is applied (C2/L14-34) and only one application of syrup is made on the centers, followed by only one application of powder coating (C4/L12-15, 35-39). Further, Cherukuri et al. discloses that the application of the powder is used to dry the syrup, and no air is forced over the centers to dry the syrup (C2/L56-59, C4/L19-25 – where air is used to dry previously applied layers of coating only when subsequent layers of the first coating syrup are required).

Regarding claim 37, modified Cherukuri et al. discloses all of the claim limitations as set forth above and further discloses that the liquid syrup comprises a bulk sweetener (Abstract, C2/L60-C3/L4) and a gum selected from the group consisting of gum arabic (C3/L24-29).

6. Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Cherukuri et al. (US 4,317,838) and in view of Kramer et al. (US 2,886,440), as applied to claim 3 above, and further in view of Urnezis et al. (US 6,350,480).

Regarding claim 13, while modified Cherukuri et al. discloses a hard shell coating made from a sweetener, the reference does not explicitly disclose that the sweetener is selected from the group consisting of sucrose, dextrose, maltose, and mixtures thereof. Urnezis et al. teaches that conventionally panning procedures generally coat with sucrose but recent advances in panning have allowed other sweetener materials to be used in place of sucrose (C7/L31-33). Therefore, the use of said sweetener including

sucrose in modified Cherukuri et al. would be obvious to one of ordinary skill in the art, because it would amount to nothing more than a use of a known sweetener for its intended use in a known environment to accomplish entirely expected results.

7. Claim 17 is rejected under 35 U.S.C. 103(a) as being unpatentable over Cherukuri et al. (US 4,317,838) and in view of Kramer et al. (US 2,886,440), as applied to claim 15 above, and further in view of Reed et al. (US 4,792,453).

Regarding claim 17, modified Cherukuri et al. discloses all of the claim limitations as set forth above. While Cherukuri et al. discloses that the powder coating layer comprises a bulk sweetener where the bulk sweetener is a polyol (C2/L60-64), the reference does not explicitly disclose that the bulk sweetener comprises hydrogenated isomaltulose. Reed et al. teaches a coated chewing gum where the coating comprises hydrogenated isomaltulose (Abstract). Further, Reed et al. teaches that hydrogenated isomaltulose is a superior sugarless sweetener in gum coating because of its high sweetening power and lack of aftertaste (C4/L31-34).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have used hydrogenated isomaltulose in the powder coating layer of the confectionery products disclosed by modified Cherukuri et al., as taught by Reed et al., for the purpose of producing an improved sugarless confectionery coating with high sweetening power and lack of aftertaste.

8. Claims 26, 28, and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cherukuri et al. (US 4,317,838) and in view of Kramer et al. (US 2,886,440), as applied to claims 5 and 32 above, and further in view of Fuisz et al (EP 0 667 147 A2).

Regarding claims 26 and 33, modified Cherukuri et al. discloses all the claim limitations set forth above. While Cherukuri et al. discloses that the comestible to be coated may include any edible solid, including a compressed tablet (see pressed candy and tablet, C5/L56-60), the reference does not explicitly disclose said pressed candy or tablet comprising a base material, a binder, a flavoring agent and a lubricant or that the center is provided by compressing a mixture of a sweetener, binder, lubricant, and flavor into a pressed tablet. Fuisz et al. teaches a process for making low-cal mint tablets from compression using a base material or sweetener (see polydextrose or mannitol, P14/L1-20), a binder (P7/L27), a flavoring agent (P14/L24), and a lubricant (P7/L30, P14/L25). Further, Fuisz et al. teaches that the resulting tablet has excellent flavor and fractures readily under medium chew pressure (P14/L26).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to used a compressed tablet comprising a base or sweetener, a binder, a flavoring agent, and a lubricant, as the confectionery center of modified Cherukuri et al, as taught by Fuisz et al., for the purpose of enhancing the chew and flavor properties in the resulting confectionery product.

Regarding claim 28, modified Cherukuri et al. discloses all the claim limitations set forth above but does not explicitly disclose that the flavoring agent comprise about

0.01% to about 2% by weight of the tablet. Since the instant specification is silent to unexpected results, the specific amount of flavoring agent is not considered to confer patentability to the claims. As intensity of flavor is a variable that can be modified, among others, by adjusting the amount of flavoring agent in the compressed tablet, with said intensity of flavor increasing as the amount of flavoring agent is increased, the precise amount of flavoring agent would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount of flavoring agent cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of flavoring agent in the compressed tablet of modified Cherukuri et al. to obtain the desired flavor intensity (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223).

9. Claims 27 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over over Cherukuri et al. (US 4,317,838) and in view of Kramer et al. (US 2,886,440), and in view of Fuisz et al (EP 0 667 147 A2) as applied to claim 26 above, and further in view of Wolf et al. (US 6,627,233).

Regarding claim 27, modified Cherukuri et al. discloses all of the claim limitations as set forth above but the reference does not disclose that the tablet comprises a high-

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intensity coolant. Wolf et al. teaches a cooling flavor composition for chewing gums which comprises a high intensity coolant selected from the group consisting of 3-1-methoxypropane-1,2 diol, menthyl succinate, menthyl lactate, menthone glycerol ketals, acyclic carboxamides, and mixtures thereof (C4/L47-52). Wolf et al. also teaches that, at effective concentrations in chewing gum, menthol or mint flavors manifest a bitter, harsh, burning taste (C2/L61-63). Further, Wolf et al. discloses that adding the physiological cooling agent provides the chewing gum with an unexpected, high-flavor impact where the harsh notes have been reduced or eliminated (C4/L21-26).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have added a physiological cooling agent to the compressed tablet of modified Cherukuri et al. for the purpose of enhancing the flavor impact and eliminating the harsh notes associated with menthol or mint flavor.

Regarding claim 29, modified Cherukuri et al. discloses all of the claim limitations set forth above, but the references does not explicitly disclose that the high-intensity coolant comprises about 0.01% to about 1% of the tablet. Since the instant specification is silent to unexpected results, the specific amount of high-intensity coolant is not considered to confer patentability to the claims. As cooling effect and flavor intensity are variables that can be modified, among others, by adjusting the amount of high-intensity coolant in the compressed tablet, with said intensity of cooling and flavor increasing as the amount of high-intensity coolant is increased, the precise amount of flavoring agent would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing

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unexpected results, the claimed amount of high-intensity coolant cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of high-intensity coolant in the compressed tablet of modified Cherukuri et al. to obtain the desired cooling and flavor intensity (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223).

10. Claims 30-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cherukuri et al. (US 4,317,838) and in view of Wolf et al. (US 6,627,233).

Regarding claim 30, Cherukuri et al. discloses:

A confectionery product comprising:

- a) a compressed product center (Abstract, Table I) comprising
 - i) a sweetener selected from the group consisting of sucrose, sorbitol and mixtures thereof (C5/L24-28, Table I);
 - ii) a lubricant (C5/L48-49); and
 - iii) flavor (C4/L50-C5/L5),
- b) a binder layer (Abstract, C2/L18-26, C3/L24-29) covering the product center comprising
 - i) a sweetener selected from the group consisting of polyols and mixtures thereof (C2/L62-65)

- ii) a binder selected from the group consisting of gum arabic (C3/L26-29); and
- c) a powder coating layer covering the binder layer (C2/L24-26, the powder coating comprising
 - i) a spray dried flavor (C4/L46-47);
 - ii) a high-intensity sweetener (C3/L18-23); and
 - iii) a bulk sweetener selected from the group consisting of polyols and mixtures thereof (C2/L62-65).

While Cherukuri et al. discloses that various flavor can be added to the compressed confectionary center (i.e. gum base) (C4/L50- C5/L5), the reference does not explicitly disclose said flavor including menthol and a physiological cooling agent. Wolf et al. teaches a cooling flavor composition for chewing gum which comprises a high intensity coolant and menthol (C4/L43-63). Wolf et al. also teaches that, at effective concentrations in chewing gum, menthol or mint flavors manifest a bitter, harsh, burning taste (C2/L61-63). Further, Wolf et al. discloses that adding the physiological cooling agent provides the chewing gum with an unexpected, high-flavor impact where the harsh notes have been reduced or eliminated (C4/L21-26). Therefore, use of said flavor including menthol and a physiological cooling agent in the compressed confectionary center of modified Cherukuri et al. would be obvious to one of ordinary skill in the art, because it would amount to nothing more than a use of a known flavor for its intended use in a known environment to accomplish entirely expected results.

Regarding claim 31, modified Cherukuri et al. discloses all of the claim limitation as set forth above but the reference does not disclose that the powder coating layers comprise about 15% to about 40% spray dried flavor, about 60% to about 80% bulk sweetener, and about 0.5% to about 3% high-intensity sweetener. Since the instant specification is silent to unexpected results, the specific amount of spray dried flavor, bulk sweetener and high-intensity sweetener is not considered to confer patentability to the claims. As flavor intensity and sweetness are variables that can be modified, among others, by adjusting the amount of spray dried flavor, bulk sweetener and high-intensity sweetener in the compressed confectionery center, with said flavor intensity and sweetness increasing as the amount of spray dried flavor, bulk sweetener and high-intensity sweetener are increased, the precise amount of spray dried flavor, bulk sweetener and high-intensity sweetener would have been considered result effective variables by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount of spray dried flavor, bulk sweetener and high-intensity sweetener cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of spray dried flavor, bulk sweetener and high-intensity sweetener in the compressed confectionery center of modified Cherukuri et al. to obtain the desired flavor intensity and sweetness (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223).

Conclusion

11. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Cherukuri et al. (US 4,238,510) – teaches a sugarless coating applied to chewing gum and confections comprising a first coating syrup and a dusting mix.

Merritt et al. (US 4,386,106) – teaches a method for preparing a controlled, delayed release encapsulated flavorant composition for use in chewable confections.

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to ELIZABETH GWARTNEY whose telephone number is (571)270-3874. The examiner can normally be reached on Monday - Thursday; 7:30AM - 5:00PM EST, Alt Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Basia Ridley can be reached on (571) 272-1453. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 4145

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/E. G./

Examiner, Art Unit 4145

/Basia Ridley/

Supervisory Patent Examiner, Art Unit 4145